The Honorable James L. Robart

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

CEMCO, LLC, a California limited liability company, Plaintiff, v. KPSI INNOVATION, INC., a Delaware corporation; SERINA KLEIN, an individual; KEVIN KLEIN, an individual; and JAMES A. KLEIN, an individual, Defendants.	Case No. 2:23-CV-00918-JLR DEFENDANTS' MEMORANDUM RE COUNTER-EVIDENCE TO REBUT WILLFULNESS

INTRODUCTION

In ruling on the parties' motions *in limine*, the Court directed the defendants to confine evidence of their subjective belief that the Patents were invalid to facts arising during the April 2016 to March 2023 period. The Court also ruled that evidence of the USPTO reexaminations is not relevant to willfulness because they were formally filed after the induced infringement began.

Defendants respectfully submit that certain events that occurred outside of the period specified by the Court—including the anticipated initiation (by a third party) of the USPTO reexam proceedings—is evidence that the jury should consider when deciding if the defendants

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subjectively believed that the Patents were invalid at the time of their challenged conduct. It is therefore relevant to proving that defendants did not willfully infringe the Patents.

MEMORANDUM

Enhanced damages under the Patent Act are limited to "egregious cases of misconduct beyond typical infringement." *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 110 (2016). This requires "a showing of willful infringement." *In re Seagate Tech., LLC*, 497 F.3d 1360, 1368 (Fed. Cir. 2007), *abrogated on other grounds*, *Halo*, 579 U.S. at 97.

The willfulness requirement is "subjective willfulness"—which can be "intentional or knowing[.]" *Exmark Mfg. Co. v. Briggs & Stratton Power Prods. Grp., LLC*, 879 F.3d 1332, 1353 (Fed. Cir. 2018) (citation omitted). Subjective willfulness can also be based on proof that the accused infringer "acted despite a risk of infringement that was either known or so obvious that it should have been known to the accused infringer[.]" *Arctic Cat Inc. v. Bombardier Recrl. Prods. Inc.*, 876 F.3d 1350, 1371 (Fed. Cir. 2017) (quotation marks and citations omitted). But willfulness requires evidence "that the accused infringer had a specific intent to infringe ***at the time of*** the challenged conduct." *BASF Plant Sci., LP v. Commonwealth Sci. & Indus. Rsch. Org.*, 28 F.4th 1247, 1274 (Fed. Cir. 2022) (citation omitted) (emphasis added).

Thus, willfulness "is generally measured against the knowledge of the actor at the time of the challenged conduct." *SRI Int'l, Inc. v. Cisco Sys., Inc.*, 930 F.3d 1295, 1309 (Fed. Cir. 2019) (citation omitted); *see also Bayer Healthcare LLC v. Baxalta Inc.*, 989 F.3d 964, 987 (Fed. Cir. 2021) ("To establish willfulness, the patentee must show the accused infringer had a specific intent to infringe at the time of the challenged conduct."). Here, certain evidence excluded by the Court because it occurred before settlement of the first lawsuit (April 2016) or after CEMCO filed this lawsuit (March 2023) is relevant counter-evidence of defendants' subjective belief about the invalidity of the Patents at the time of their challenged conduct—and should be considered by the jury when it decides whether defendants acted willfully.

First, although a third party initiated the USPTO reexam proceedings after CEMCO filed this lawsuit, James Klein would testify at trial that he was aware of the pending reexams before

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they were initiated (and this lawsuit was filed). Because much of CEMCO's induced infringement claim is based on sales that occurred between the time Mr. Klein learned of the pending reexam proceedings and the initiation of this lawsuit, and because CEMCO will offer evidence during that period to support its willfulness arguments, defendants should be allowed to offer counter-evidence that supports their argument that they subjectively believed—based on the pending USPTO reexams—that the Patents were invalid at the time of the challenged conduct.

Second, although Mr. Trojan's 2015 letter was received before April 2016, it influenced Mr. Klein's subjective belief about the Patents after April 2016; specifically, it caused him to believe that the Patents were invalid. Again, defendants should be allowed to offer the letter as counter-evidence of their subjective belief that the Patents were invalid at the time of the challenged conduct.

Finally, CEMCO is seeking compensatory damages—and enhanced damages—for conduct that occurred after May 2023. For example, CEMCO has cross-examined witnesses as to why post-May 2023 developments in this litigation did not cause them to change their conduct. If the truthful answer to those questions is that their conduct was informed by *other* post-May 2023 events (e.g., the reexam proceedings), defendants should be permitted to present that evidence to the jury. Defendants should be allowed to offer evidence regarding the USPTO reexam proceedings that occurred during the post-May 2023 period, if they are the explanation for the conduct CEMCO has inquired about. CEMCO will be allowed to offer evidence of the continuing sale of products during that period to support its willfulness arguments, and defendants should be allowed to offer counter-evidence that supports their subjective belief that the Patents were invalid based upon parallel events that were developing at the time.

CONCLUSION

For the foregoing reasons, defendants respectfully submit that certain events that occurred outside of the period specified by the Court—including the anticipated initiation of the USPTO reexam proceedings and the fact of the reexam itself—is evidence that the jury should

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consider when deciding if the defendants subjectively believed that the Patents were invalid at the time of their challenged conduct.

DATED: December 5, 2024.

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